Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd

SUPREME COURT (IPOH) — CIVIL APPEAL NO 02–542–1992
ABDUL HAMID OMAR LP, EDGAR JOSEPH JR AND MOHAMED DZAIDDIN SCJJ
20 APRIL 1994

Civil Procedure *— Appeal — Discretionary order by senior assistant registrar — Whether judge should give weight to decision of senior assistant registrar — Whether judge fettered by decision of senior assistant registrar — Whether judge should exercise his own discretion — Whether an appeal in its true sense or a rehearing*

Civil Procedure *— Appeal — Discretionary order by senior assistant registrar — Whether decisions of judge and senior assistant registrar were concurrent findings of fact — Whether actually only one decision*

Arbitration *— Stay of proceedings — Onus on applicant to show willingness to do all things necessary for arbitration — Duty of applicant at early stages of proceedings — Arbitration Act 1952 s 6*

Arbitration *— Stay of proceedings — When available — Whether there was delay in applying for stay — Whether application bona fide — Arbitration Act 1952 s 6*

Arbitration *— Stay of proceedings — Steps in the proceedings — Whether defendant had taken a step in the proceedings by filing affidavit opposing grant of interlocutory injunction and challenging jurisdiction of the court*

Arbitration *— Stay of proceedings — When available — Whether applicant entitled to a stay as of right if all conditions in s 6 of the Arbitration Act 1952 satisfied — Discretion of court — Arbitration Act 1952 s 6*

The appellant ('the contractor') had been appointed by the Ministry of Defence to carry out development of a project in Labuan. By a contract ('the sub-contract') entered into by the contractor and the respondent ('the sub-contractor'), the contractor had appointed the sub-contractor to manage and complete the overall construction. The sub-contract contained an arbitration clause. The construction was delayed and there were complaints by the Government that the works were defective. The sub-contractor denied that it was responsible for the delays or that the works were defective.

The contractor gave the sub-contractor formal notice that it was in default of the sub-contract and required the sub-contractor to remedy the defaults. When the sub-contractor failed to comply with the notice, the contractor purported to determine the sub-contract. The contractor then sought to take possession of the site but this was resisted by the sub-contractor who issued a writ of summons for a declaration, inter alia, that the notice of termination was invalid and the sub-contract was still subsisting. The sub-contractor also obtained an ex parte interlocutory injunction restraining the contractor from prohibiting the sub-contractor from entering the project site.

The contractor applied for a stay of proceedings under s 6 of the Arbitration Act 1952 ('the Act') to refer the matter to arbitration and filed several affidavits opposing the injunction. It also raised a preliminary objection challenging the jurisdiction of the court to grant the injunction but this was overruled. Subsequently, however, by consent of the parties, the injunction was dissolved. The senior assistant registrar ('the SAR') dismissed the contractor's application for a stay, from which it appealed to the judge-in-chambers. The judge dismissed the appeal on the grounds that: (a) although the decision of the SAR was not binding on the court, it deserved consideration and acceptance if it was correct and based on judicial principle; (b) the contractor had failed to show that it was ready and willing to do all things necessary for the proper conduct of the arbitration; (c) the contractor's application for stay was made too late and not bona fide as it was motivated by a desire to obtain delay; and (d) the contractor had taken a step in the proceedings by filing an affidavit to set aside the injunction and making the preliminary objection challenging the jurisdiction of the court. [See [1994] 1 MLJ 422.] The contractor appealed.

Held, allowing the appeal and referring the matter to arbitration:

(1) In an appeal from a discretionary order of the SAR to a judge-in-chambers, the judge should exercise his own discretion as though the matter was before him for the first time, unfettered by the previous exercise of the SAR's discretion. The judge should give the decision the weight it deserves and since the SAR gave only a bare decision or a simple *ipse dixit*, and not a judgment, it deserved no weight at all. Yet the judge gave some weight to the decision of the SAR. Furthermore, although the matter before the judge was in form an appeal, it took the shape and style of a rehearing. The judge was therefore wrong in treating the matter as an appeal and by taking the approach that he was not to exercise an independent discretion of his own, but had to defer to the SAR's exercise of his discretion and could not interfere with it merely on the ground that he would have exercised it differently.

(2) In the event of a further appeal from the judge to the Supreme Court, the substantial discretion is that of the judge and it is the judge's order which becomes most material. The decisions of the SAR and the judge were therefore not concurrent findings of fact.

(3) For the grant of a stay, the defendant must demonstrate to the court by affidavit evidence that at the time when proceedings were commenced up to the time when the exercise of the court's discretion is sought for the grant of a stay, he is ready and willing to do all things necessary to the proper conduct of the arbitration. The onus on the plaintiff is to satisfy the court that he ought to be allowed to continue the action. In this case, the judge failed to recognize that at such an early stage, there was little the contractor was obliged to do beyond asserting a willingness to appoint an arbitrator and that the contractor had virtually no opportunity to raise the arbitration clause before the issue of the writ. The judge

ought, therefore, to have ruled that the contractor was at all material times ready and willing to do all things necessary to the proper conduct of the arbitration.

(4) There was nothing to suggest that the contractor was invoking the arbitration clause with a view to delaying or frustrating the resolution of the dispute. The judge had misread the record when he observed that the contractor had resorted to s 6 of the Act with a view to stay the proceedings after it had failed to set aside the injunction since it was only after applying for a stay that the contractor filed various affidavits opposing the grant of the injunction and challenging the jurisdiction of the court. The judge ought, therefore, to have ruled that there was no lack of diligence on the part of the contractor in invoking the arbitration clause and that the application for a stay under s 6 of the Act was made bona fide.

(5) The filing of affidavits by the contractor seeking discharge of the ex parte interlocutory injunction and the taking of the preliminary objection challenging the jurisdiction of the court did not indicate an election to abandon its right to a stay nor did it have the effect of invoking the jurisdiction of the court and so the contractor had not taken a step in the proceedings.

(6) However, even if a party can satisfy the court that the conditions for the grant of a stay under s 6 of the Act are satisfied, it does not ipso facto follow that he will be entitled to a stay as of right, for the court still retains a discretion to refuse it. But, generally, those who make a contract to arbitrate their disputes should be held to their bargain. In this case, an arbitrator with the necessary expertise might well be better able to deal with the issues which will arise for decision than a judge. Therefore, the appeal was allowed with costs at all levels, the order for stay of proceedings under s 6 of the Act was granted and the claims referred to arbitration.

[Bahasa Malaysia summary

Perayu ('kontraktor itu') telah dilantik oleh Kementerian Pertahanan untuk menjalankan pemajuan suatu projek di Labuan. Melalui suatu kontrak ('sub-kontrak itu') yang diikat oleh kontraktor itu dan responden ('sub-kontraktor itu'), kontraktor itu telah melantik sub-kontraktor itu untuk mengurus dan menyempurnakan kerja-kerja pembinaan itu pada keseluruhannya. Sub-kontrak itu mengandungi suatu fasal timbangtara. Kerja-kerja pembinaan itu lewat disiapkan dan terdapat aduan daripada pihak kerajaan bahawa kerja-kerja tersebut mempunyai kecacatan. Sub-kontraktor itu menafikan bahawa ia bertanggungjawab atas kelengahan itu atau bahawa kerja-kerja tersebut cacat.

Kontraktor itu telah memberi sub-kontraktor itu notis rasmi bahawa ia telah memungkiri sub-kontrak itu dan menghendaki sub-kontraktor itu membaiki kecacatan tersebut. Apabila sub-kontraktor itu gagal mematuhi notis itu, kontraktor itu kononnya telah menamatkan sub-

kontrak itu. Kontraktor itu kemudiannya cuba memiliki kawasan projek itu tetapi telah dihalang oleh sub-kontraktor yang mengeluarkan suatu writ saman untuk suatu deklarasi, antara lain, bahawa notis penamatan itu tidak sah dan sub-kontrak itu masih berterusan. Sub-kontraktor itu juga telah mendapatkan suatu injunksi interlokutori ex parte untuk menghalang kontraktor itu daripada menghalang sub-kontraktor itu daripada memasuki kawasan projek itu.

Kontraktor itu telah memohon untuk suatu penggantungan prosiding di bawah s 6 Akta Timbangtara 1952 ('Akta itu') supaya merujuk perkara itu untuk ditimbangtara dan memfailkan beberapa afidavit menentang injunksi itu. Ia juga menimbulkan suatu bantahan permulaan untuk mencabar bidang kuasa mahkamah untuk memberi injunksi itu tetapi ini telah ditolak. Tetapi kemudiannya, injunksi itu telah dibubarkan dengan persetujuan pihak-pihak. Penolong kanan pendaftar ('PKP itu') telah menolak permohonan kontraktor itu untuk suatu penggantungan, dan kontraktor itu telah membuat rayuan kepada hakim dalam kamar. Hakim itu telah menolak rayuan itu atas alasan bahawa: (a) walaupun keputusan PKP itu tidak mengikat mahkamah, ia seharusnya dipertimbangkan dan diterima jika ia betul dan berdasarkan prinsip kehakiman; (b) kontraktor itu gagal menunjukkan bahawa ia sedia dan sanggup melakukan apa jua yang perlu untuk pengendalian timbangtara itu secara betul; (c) permohonan kontraktor itu untuk suatu penggantungan telah dibuat terlalu lewat dan tidak bona fide kerana dibuat dengan tujuan melengahkan prosiding; dan (d) kontraktor itu telah mengambil suatu langkah di dalam prosiding itu dengan memfailkan suatu afidavit untuk mengetepikan injunksi itu dan membuat bantahan permulaan untuk mencabar bidang kuasa mahkmah. [Lihat [1994] 1 MLJ 422.] Kontraktor itu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu dan merujuk perkara itu untuk ditimbangtara:

(1) Di dalam suatu rayuan terhadap suatu perintah budi bicara PKP itu kepada hakim dalam kamar, hakim itu seharusnya menggunakan budi bicaranya sendiri seperti perkara itu dibawa di hadapannya buat kali pertamanya, tanpa dibelenggu oleh penggunaan budi bicara oleh PKP yang terdahulu itu. Hakim itu seharusnya memberi keputusan itu pertimbangan yang ia sepatutnya diberikan dan oleh kerana PKP itu hanya memberi suatu keputusan yang kosong ataupun suatu *ipse dixit* ringkas, dan bukannya suatu penghakiman, ia tidak seharusnya diberikan pertimbangan langsung. Akan tetapi, hakim itu telah memberikan pertimbangan kepada keputusan PKP itu. Lebih-lebih lagi, walaupun perkara di hadapan hakim itu berbentuk suatu rayuan, ia mengambil corak dan gaya suatu pendengaran semula. Oleh yang demikian, hakim itu telah membuat kesalahan apabila menyifatkan perkara itu sebagai suatu rayuan dan dengan

A mengambil pendekatan bahawa beliau tidak seharusnya menggunakan budi bicaranya secara bebas tetapi terpaksa mengikut penggunaan budi bicara PKP itu dan tidak boleh bercampur tangan dengan keputusan itu semata-mata atas alasan bahawa beliau akan menggunakan budi bicaranya dengan cara yang lain.

B (2) Di dalam kes di mana suatu rayuan selanjutnya dibuat daripada hakim kepada Mahkamah Agung, budi bicara yang penting merupakan budi bicara hakim itu dan perintah hakim itulah yang menjadi penting sekali. Oleh itu, keputusan PKP dan hakim itu tidak merupakan pendapat fakta bersama.

C (3) Supaya suatu penggantungan dapat diberikan, defendan mesti menunjukkan kepada mahkamah melalui keterangan afidavit bahawa pada masa prosiding dimulakan sehingga masa apabila penggunaan budi bicara mahkamah dipohon untuk suatu penggantungan, beliau sedia dan sanggup membuat apa jua yang perlu untuk pengendalian timbangtara itu secara betul. Beban terletak di atas plaintif untuk memuaskan mahkamah bahawa

D beliau seharusnya dibenarkan meneruskan tindakan itu. Di dalam kes ini, hakim itu gagal untuk menyedari bahawa pada peringkat seawal ini, tidak banyak yang terpaksa dilakukan oleh kontraktor itu selain daripada menegaskan kesanggupannya untuk melantik seorang penimbangtara dan bahawa kontraktor itu hampir tidak

E mempunyai peluang untuk menimbulkan fasal timbangtara sebelum writ itu dikeluarkan. Oleh itu, hakim itu sepatutnya memutuskan bahawa kontraktor itu sedia dan sanggup membuat apa jua yang perlu bagi pengendalian timbangtara itu secara betul.

F (4) Tidak terdapat apa-apa untuk menunjukkan bahawa kontraktor itu menggunakan fasal timbangtara itu bagi tujuan melengah atau mengecewakan penyelesaian pertikaian ini. Hakim itu telah silap membaca rekod kes ini apabila beliau memerhatikan bahawa kontraktor itu telah menggunakan s 6 Akta itu dengan tujuan untuk menggantung prosiding ini selepas ia gagal mengetepikan

G injunksi itu kerana hanya selepas memohon penggantungan prosiding ini barulah kontraktor itu memfailkan berbagai afidavit untuk menentang pemberian injunksi itu dan untuk mencabar bidang kuasa mahkamah. Oleh kerana itu, hakim seharusnya memutuskan bahawa tidak terdapat kekurangan kerajinan pada

H pihak kontraktor itu dalam menggunakan fasal timbangtara itu dan bahawa permohonan untuk penggantungan telah dibuat dengan bona fide.

(5) Pemfailan afidavit oleh kontraktor itu untuk memohon pelepasan injunksi interlokutori ex parte itu dan penimbulan bantahan permulaan untuk mencabar bidang kuasa mahkamah tidak

I menandakan suatu pilihan untuk menggugurkan haknya untuk mendapatkan penggantungan mahupun mempunyai kesan menggunakan bidang kuasa mahkamah dan dengan demikian,

kontraktor itu tidak mengambil suatu langkah di dalam prosiding ini. A

(6) Bagaimanapun, jika seseorang dapat memuaskan mahkamah bahawa syarat-syarat untuk pemberian suatu penggantungan di bawah s 6 telah dipenuhi, ini tidak ipso facto bermakna bahawa beliau mengikut hak sepatutnya mendapatkan suatu penggantungan, kerana mahkamah masih mempunyai budi bicara untuk menolak permohonan itu. Tetapi, secara amnya, mereka yang mengikat kontrak supaya pertikaian mereka ditimbangtara patut dipegang kepada perjanjian mereka. Di dalam kes ini, seorang penimbangtara dengan kepakaran yang diperlukan mungkin lebih berkebolehan untuk membicarakan isu-isu yang akan timbul untuk keputusan berbanding dengan seorang hakim. Oleh itu, rayuan ini dibenarkan dengan kos pada semua peringkat, perintah penggantungan prosiding di bawah s 6 Akta itu dibenarkan dan tuntutan-tuntutan itu dirujuk untuk ditimbangtara.] B C

Notes D

For cases on steps taken in the proceedings, see 1 *Mallal's Digest* (4th Ed) para 633; [1989] Mallal's Digest 33–34, 501; [1992] Mallal's Digest 57, 359.

For cases on a stay of proceedings where there is an arbitration agreement, see 1 *Mallal's Digest* (4th Ed) paras 636–637; 2 *Mallal's Digest* (4th Ed) paras 2121–2126. E

Cases referred to

1 *Dooley v The London Assurance* (1872) 6 ILT 31 (distd)
2 *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 (refd) F
3 *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646 (folld)
4 *Blundell v Rimmer* [1971] 1 All ER 1072; [1971] 1 WLR 123 (folld)
5 *Herbs and Spices Trading Post Pte Ltd v Deo Silver (Pte) Ltd* [1991] 2 MLJ 311 (folld)
6 *Piercy v Young* (1880) 14 Ch D 200 (refd)
7 *Phoenix v Pope* [1974] 1 All ER 512; [1974] 1 WLR 719 (refd) G
8 *Roussel-Uclaf v GD Searle & Co Ltd* [1978] 1 Lloyd's Rep 225 (folld)
9 *Zalinoff v Hammond* [1898] 2 Ch 92 (refd)
10 *Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] 1 All ER 151 (refd)
11 *Wickham v Harding* (1859) 28 LJ Ex 215 (refd) H
12 *Heyman v Darwins Ltd* [1942] AC 356 (folld)
13 *The Eleftheria* [1969] 1 Lloyd's Rep 237; [1969] 2 All ER 641; [1969] 2 WLR 1073 (refd)

Legislation referred to

Arbitration Act 1952 s 6 I

Appeal from: Civil Suit No S1–22–526–1991 (High Court, Kuala Lumpur)

Vinayak Prathan (*Chee Yok Yung* with him) (*Sheikh Shatar, Cheah, Tan & Lee*) for the appellant.

G Sri Ram (*Philip Chong* with him) (*Philip Chong & Co*) for the respondent.

Cur Adv Vult

Edgar Joseph Jr SCJ (delivering the judgment of the court): This is an appeal from the judgment of Ee Chin Seng JC ('the judge') dismissing an appeal from the decision of the senior assistant registrar ('the registrar') refusing an application for stay of an action commenced by the appellant ('the contractor') against the respondent ('the sub-contractor') under s 6 of the Arbitration Act 1952 ('the Act'), which provides:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make the order staying the proceedings.

The facts underlying this appeal may be shortly stated. The contractor had been appointed by the Ministry of Defence of the Government of Malaysia, to carry out certain development works in respect of a project known as Kerja Pembinaan Awam in Kubong, Labuan ('the project') and, pursuant thereto, a contract in writing dated 23 November 1990 was entered into by the contractor and the Ministry of Defence ('the main contract').

By a contract in writing entered into by the contractor and the sub-contractor dated 17 January 1991 ('the sub-contract'), the contractor had appointed the sub-contractor to manage and complete the overall construction of the project in accordance with the stipulations, provisions and conditions set out in the main contract.

Pursuant to the sub-contract, the sub-contractor had carried out construction works and had delivered materials on site in respect of which three interim certificates had been issued by the consultant engineer. The contractor paid the sub-contractor 95% of the amounts certified under the first and the second interim certificates while moneys due under the third interim certificate were paid into a joint account by the contractor on 14 November 1991 and withdrawn some four days later.

However, as events turned out, construction was delayed and there were complaints by the Government that the works were also defective. The sub-contractor whilst admitting that the works were delayed, denied that it was responsible for the delays or that the works were defective.

In the upshot, by a letter dated 26 October 1991, the contractor gave the sub-contractor formal notice that it was in default of the provisions of s 3.01(3)(a)–(h) of art III of the sub-contract, made reference to s 5.02 of art V, and required the sub-contractor to remedy the defaults within seven

days from date of receipt thereof, failing which the contractor would determine the sub-contractor's employment. The contractor then by a letter dated 13 November 1991, alleged non-compliance and purported to determine the sub-contractor's employment under the sub-contract. Next, the contractor had then sought to take possession of the site but this was resisted by the sub-contractor. A

Then, on 21 November 1991, the sub-contractor, without further ado, caused to be issued the writ of summons herein claiming a declaration that the notice of termination of the sub-contract was invalid, that the sub-contract was still subsisting and praying for specific performance and unspecified damages for breach of contract. B

It was alleged by the contractor, and not challenged by the sub-contractor, that prior to the issue of the writ of summons, no claim had been made by the sub-contractor against the contractor. C

On the same day that the writ of summons was issued, the sub-contractor had applied for and obtained an ex parte interlocutory injunction restraining the contractor from prohibiting the sub-contractor from entering the project site. D

On 28 November 1991, the contractor entered a conditional appearance and applied by summons for a stay of the proceedings under s 6 of the Act.

Thereafter, the contractor filed a number of affidavits opposing the grant of the injunction.

Before Anuar J on 3 December 1991, the contractor took a preliminary objection challenging the jurisdiction of the court to grant the injunction but this was overruled. However, on 2 January 1992, by consent of parties the injunction was dissolved. E

On 27 March 1992, the registrar heard and dismissed the contractor's application for stay under s 6 of the Act, from which it appealed to the judge-in-chambers. F

The grounds on which the judge dismissed the application were fourfold and may be stated thus:

(a) Due weight had to be given to the decision of the registrar who, in refusing the application, had exercised her discretion. Though this did not mean that the decision of the registrar was in any way binding on the court, it deserved consideration and acceptance, if such exercise of discretion was correct and based on judicious and judicial principle. G

(b) Although the court is inclined to give effect to the wishes of the parties as they appear in the arbitration clause, it was for the contractor to demonstrate to the court that at all material times, it was ready and willing to do all things necessary for the proper conduct of the arbitration; this was a condition precedent. There was an absence of such evidence *ante litem motam*. H

(c) The contractor's application for stay was made too late in the day and not bona fide, considering that it was made only after its unsuccessful attempt before Anuar J to set aside the injunction. The judge thought that the contractor's application for stay was motivated by a desire to obtain delay. The authority to which he referred was *Dooley v The* I

London Assurance[1] in which Pigot CB when speaking for the court with reference to an application by a party claiming that proceedings should be stayed under s 14 of the Common Law Procedure Amendment Act 1856, because there was an arbitration agreement in force said this (at p 33):

> It appears to me that this contract is one which ought to be effectuated within all legitimate limitations; but the provision which we have to administer is one which requires to be carefully scanned and considered, with reference to the conduct of the party who seeks to avail himself of it. It may be made the engine of delay, and I think it very important with a view to speed, that parties who are entitled under a contract, to which a condition of the present character is attached, and who are desirous of taking advantage of that provision, should intimate that desire to the opposite party at the earliest possible moment, in the ordinary course of business.

(d) The contractor had, before applying for a stay under s 6 of the Act, taken 'a step in the proceedings' and had thereby affirmed the correctness of the proceedings and its willingness to be bound by the court proceedings. In particular, said the judge, the contractor had not merely filed an affidavit to set aside the injunction but also, counsel on its behalf had attended the hearing before Anuar J and taken a preliminary objection challenging the jurisdiction of the court, though the same was overruled. [See [1994] 1 MLJ 422.]

We shall now turn to consider, seriatim, the four separate grounds advanced by the judge for refusing the contractor's application for a stay under s 6 of the Act.

As to (a): What weight should the judge have accorded to the decision of the registrar?

With reference to the decision of the registrar refusing the contractor's application for a stay, the judge said this [at p 431]:

> Whatever it is, due weight should be given to the decision of the learned SAR who had exercised his or her discretion in refusing the order of stay. Such a view can be found in the cited cases of *Evans v Bartlam* [1937] AC 473 and *Kiu May Construction Co Ltd Wai Cheong Co Ltd* (1985) 29 BLR 137. This is to say in my view, though such decision of the SAR is definitely not binding on this court, it deserves this court's consideration and acceptance if such exercise of discretion is correct based on judicious and judicial principle. There is no evidence to show otherwise in our present case to warrant a total disregard of that decision.

And, two pages later, after referring to the principles enunciated in the Supreme Court decision of *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd*,[2] with regard to arbitration clauses under s 6 of the Act, the judge said this [at p 432]:

> In the light of the above-enunciated principles, I am of the considered view that the learned SAR had exercised proper and judicious discretion based on the settled principle of laws to refuse the stay of proceedings in the High Court, Kuala Lumpur to refer the dispute to the arbitration tribunal for determination.

Now, in *Evans v Bartlam*,[3] Lord Atkin said this (at p 478):

> The power to set aside a judgment obtained on default of appearance is given to the court or a judge under O XII r 10; and a similar power extending to judgments by default under any rule is given by O XXVII r 15. It is a power entrusted to the discretion of the court or judge, and by O LIV r 12, the Master is given jurisdiction to exercise the discretion.
>
> As to the limits of the discretion, if any, it may be necessary to say a word or two later. I stay only to mention a contention of the respondent that the Master having exercised his discretion, the judge-in-chambers should not reverse him unless it was made evident that the Master has exercised his discretion on wrong principles. I wish to state my conviction that where there is a discretionary jurisdiction given to the court or a judge, the judge-in-chambers is in no way fettered by the previous exercise of the Master's discretion. His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master: but he is in no way bound by it. This, in my experience, has always been the practice in chambers, and I am glad to find it confirmed by the recent decision of the Court of Appeal in *Cooper v Cooper* [1936] WN 205, with which I entirely agree.

Two things are plain from the above passage in the judgment of Lord Atkin, namely:

(1) in an appeal from a discretionary order of the Master (equivalent here to a senior assistant registrar) to a judge-in-chambers, the judge exercises his own discretion as though the matter comes before him for the first time, unfettered by the previous exercise of the Master's discretion; and
(2) so far as the Master's decision is concerned, the judge will give it the weight it deserves.

In *Blundell v Rimmer*,[4] Payne J when considering an appeal from an order of the district registrar giving leave to sign interlocutory judgment in an action for negligence, had occasion to refer to Lord Atkin's speech in *Evans v Bartlam*[2] in these terms [at p 1076]:

> I understand that the arguments before me ranged over a wider ground than those advanced by the parties' solicitors to the district registrar, and it was contended by counsel for the plaintiff that I was fettered by the proceedings before the district registrar and confined to the arguments which were presented to him; that no point could be raised before me which was not raised below. It is, I think, clear on authority that the appeal from the district registrar is a rehearing of the application and I am entitled to treat the matter as though it comes before me for the first time; moreover, that I am not fettered by the previous exercise of the district registrar's discretion, although I should, of course, give to it the weight which it deserves. Authority can be found for this proposition in the speech of Lord Atkin in *Evans v Bartlam* and in the notes in 1 *The Supreme Court Practice 1970* at p 759 para 58/1/2, p 762 para 58/4/1, under RSC O 58 rr 1 and 4.

In the Singapore High Court case of *Herbs and Spices Trading Post Pte Ltd v Deo Silver (Pte) Ltd*,[5] a similar point was made by Chan Sek Keong J in these terms (at p 313 col 2C–E):

> The situation in O 55 is analogous to 'appeals' from the decisions of the registrar of the High Court to the judge-in-chambers. In such appeals, the judge-in-chambers is not exercising 'appellate' jurisdiction in the same sense when it hears appeals from the district court. This view is consistent with the rule that an appeal from the registrar of the High Court to the judge-in-chambers is by way of an actual rehearing of the application and the judge treats the matter afresh as though it came before him the first time ...

With Lord Atkin's observations in mind, the first point we should like to make is that since the registrar gave no judgment but only a bare decision, or in other words, a simple *ipse dixit*, it deserved no weight at all. Yet, it is obvious that the judge gave some weight to the decision of the registrar.

The second point we should like to make is that the judge did mention in passing — in our view quite correctly — that though the matter before him was in form an appeal, it did 'take the shape and style of rehearing...'. However, in his approach to the questions for decision, he treated the appeal, in the fullest sense, as an appeal from a discretionary order made by the registrar.

In other words, it looks very much as though the judge's approach was that he should not interfere with the registrar's exercise of discretion unless it was shown that the discretion had been exercised on a wrong principle or not at all, or that there had been a miscarriage of justice. In other words, as an appellate judge, he was not to exercise an independent discretion of his own, but had to defer to the registrar's exercise of his discretion and could not interfere with it merely on the ground that he would have exercised it differently. (See 37 *Halsbury's Laws of England* (4th Ed) para 656 at p 493.) In adopting this approach, the judge was wrong, the appeal before him being from the registrar by way of an actual rehearing.

Accordingly, in the event of a further appeal from the judge to the Supreme Court, the substantial discretion is that of the judge and it is the judge's order which becomes most material. We are supported in this by the following passage in the judgment of Lord Wright in *Evans v Bartlam*[3] at p 484:

> The Master had, in the exercise of his discretion under O XXVII r 15, or O XIII r 10, refused to set aside the judgment. But it is clear that where the Court of Appeal is required to review a discretionary order of a judge reversing the Master the substantial discretion is that of the judge, and it is the judge's order which must particularly be considered by the appellate court: *Cooper v Cooper* [1936] WN 205. The Masters admirably exercise their discretion in routine matters of pleading, discovery, interrogatories, venue, mode of trial, and other interlocutory directions, without any appeal being necessary. But such matters may on occasion raise questions most vital to the final issue of the case. The decision of such questions is properly for the judge who will no doubt consider carefully the order of the Master. If a further appeal is taken to the Court of Appeal it is the judge's discretion which that court has either to support or vary or reverse.

With respect, counsel for the sub-contractor was, therefore, equally wrong in contending before us, as he did in fact contend, that the present appeal was an appeal against concurrent findings of fact, with all the disadvantages this entails for those who seek to challenge such findings.

As to (b): Was the contractor ready and willing to refer the disputes to arbitration? A

It is clear law, scarcely needing any express authority, that for the grant of a stay, the applicant must demonstrate to the court by affidavit evidence (*Piercy v Young*[6] at p 209) that both at the time when proceedings were commenced and to the time when the exercise of the court's discretion is sought for the grant of a stay, that he is ready and willing to do all things B necessary to the proper conduct of the arbitration. The onus on the plaintiff is to satisfy the court, not so much that he has a right to continue, but that he ought to be allowed to continue the action. It goes without saying that the discretion reposed in the court is a judicial one to be exercised having regard to the particular circumstances of each case. (See *Phoenix v Pope.*[7])

In the present case, the contractor's director, Chan Nung Wai, had C deposed by para 6 of his affidavit dated 28 November 1991, filed in support of the summons for stay, that:

> At the time this action was commenced, I was, and I remain, ready and willing to do all things requisite to enable all the matters in dispute as aforesaid to be determined by arbitration in accordance with the provisions of the said agreement. D

This para was taken straight from 6 *Atkins' Court Forms* (2nd Ed, 1989). Nowhere in the affidavit-in-opposition filed on behalf of the sub-contractor was that assertion contradicted.

However, the judge took the view that an oath merely affirming that an applicant for a stay is 'ready and willing to do all things necessary for the E arbitration' is insufficient, and that therefore, as the termination in the present case appeared to have been done with dubious intent, it was for the trial judge to determine whether the termination of the sub-contract was right or wrongful in subsequent breach of contract proceedings. The judge also pointed out that although both parties had the benefit of legal advice, the contemporary correspondence did not show a desire or intention on the F part of the contractor to refer the disputes to arbitration.

The judge failed to recognize that at such an early stage, there is little a defendant is obliged to do in the arbitration beyond asserting a willingness to appoint an arbitrator and this, of course, means that the plaintiff will be hard put to refute the assertion.

As for the point made by the judge that the contemporary correspondence G did not reveal a desire or intention on the part of the contractor to refer the disputes to arbitration, we need hardly say that the contemporary correspondence would, of course, have to be read having regard to the history of the matter.

With a view to elucidating the issues which arise for decision regarding H this part of the case, we must now refer to the contemporary correspondence passing between the parties showing what they say.

The first letter we should like to refer to is the one dated 26 November 1991, from the contractor to the sub-contractor threatening termination of the sub-contract and which was as follows:

I

> Dear Sirs
>
> Re: Project Mou-Martello Di Labuan — Package 1
> Notice to remedy breach of the agreement dated 17 January 1991
> Between Seloga Jaya Sdn Bhd and Pembenaan Keng Ting (Sabah) Sdn Bhd

We hereby notify you that you are in default of all the provisions of s 3.01(3)(a)–(h) of art III of the agreement dated 17 January 1991 made between you and us.

In accordance with s 5.02 of art V of the said agreement, we hereby require you to remedy all the defaults within seven days of receipt of this notice, failing which we shall without prejudice to any other rights and remedies which we may possess, determine your engagement under the said agreement.

Yours faithfully
— Sgd —
Chan Nung Wai
Managing director

Upon receipt of that letter, negotiations for a settlement followed, as appears from the solicitors for the sub-contractor's letter in reply dated 1 November 1991, addressed to the contractor which was as follows:

Dear Sirs

Re: Project Mou-Martello Di Labuan

We refer to your letter dated 26 October 1991 addressed to our client and we have our client's instructions to reply thereto as follows.

We have been instructed by our client to put on record that they are not in default as alleged in your said letter and therefore your purported notice of termination is improper and invalid.

Our client's acceptance of your invitation and their attendance at the meeting held on 31 October 1991 at your office was for the purpose of discussing matters relating to the project and is not to be taken or interpreted as an admission of any liability or default on their part.

Similarly, the subsequent agreement and/or acceptance of any new proposed arrangement or variation of the original terms reached at the meeting is solely for the purpose of mutual benefit pertaining to the project.

Yours faithfully
— Sgd —
(Illegible)

However, the negotiations for settlement were unsuccessful and by the letter dated 13 November 1991, the contractor served upon the sub-contractor a notice of termination of the sub-contract which was as follows:

Dear Sirs

Re: Project Mou-Martello Di Labuan — Package 1
Determination of your engagement under the agreement dated 17 January 1991

We refer to our notice dated 26 October 1991 requiring you to remedy all the defaults within seven days of receipt of the said notice.

We note that notwithstanding the said notice, you have failed to remedy all the defaults. In accordance with s 5.02 of art V of the agreement dated 17 January 1991 made between you and us, we hereby forthwith determine your engagement under the said agreement and all rights and benefits conferred on you thereunder shall terminate immediately.

We shall be carrying out a valuation of the work done and materials delivered to the site by you shortly and shall inform of the day and time of such valuation, to which you are invited to be present. In the event that we do not suffer any loss

expense or damage upon completion of the project, we shall pay the amount, if any, due to you based on such valuation but should we suffer any loss expense or damage in excess of the amount, if any, due to you based on such valuation, we shall claim the difference from you. A

Yours faithfully
— Sgd —
Chan Nung Wai
Managing director B

The sub-contractor, however, did not respond to the notice of termination but instead contested its validity by issuing the writ of summons herein on 21 November 1991 claiming a declaration that the termination was invalid, that the contract was still subsisting and asking for specific performance and unspecified damages for breach of contract. The writ of summons, incidentally, was the first intimation of the sub-contractor's claim for damages. C

The contractor then attempted to take possession of the site but this was resisted by the sub-contractor. D

In these circumstances, the judge ought to have recognized that the contractor had virtually no opportunity to raise the arbitration clause by way of correspondence before the issue of the writ. Thus, the sub-contractor was in no position to rebut the contractor's assertion on affidavit, in common form, made on its behalf by its director, Chan Nung Wai, that it was, at all material times, ready and willing to arbitrate. E

True it is that the Act contemplates promptitude on the part of those seeking to avail themselves of the arbitration clause. However, in our view, having regard to the chronology of events, the contractor had clearly complied with this requirement.

The judge ought, therefore, to have ruled that the contractor was at all material times ready and willing to do all things necessary to the proper conduct of the arbitration. F

We would go further and say that having regard to the evidence, there is nothing to suggest that the contractor was invoking the arbitration clause with a view to delaying or frustrating the resolution of the dispute.

G

As to (c): Was there undue delay and/or lack of bona fides on the part of the contractor in applying for a stay?

This ground is intimately connected with ground (b), since, if the applicant for a stay is unable to satisfy the court that it is not his intention to use the arbitration clause as an engine of delay or indeed to frustrate altogether the resolution of the dispute, then obviously, in practice, it would be impossible for him to show that he is ready and willing to do all things necessary to the proper conduct of the arbitration. Conversely, when, as here, we have found that the contractor was at all material times so willing and able, the argument based on delay and lack of bona fides must lose its sting. H

The history of the proceedings shows quite clearly that it was only after applying for a stay that the contractor filed various affidavits opposing the grant of the injunction and challenging the jurisdiction of the court to grant I

A the injunction at the hearing before Anuar J. The judge had, therefore, misread the record when he observed in the penultimate paragraph of his judgment that 'After the unsuccessful attempt before the learned judge Anuar J to set aside the injunction, the defendant now resorted to the provisions of s 6 of the Act with a view to stay the proceedings.'

B As for *Dooley*'s case[1] upon which the judge relied, it was readily distinguishable on the facts from the present case, because there, unlike here, there was an allegation of fraud which made dispute resolution by arbitration unsuitable. This distinction is made clear in all the three judgments but especially so by Fitzgerald B in the last sentence of his judgment where he said this (at p 34 para 2):

C

> As to why it ought not to be referred, it does appear to me from what has taken place, that there would seem to have been a disposition to raise a question of fraud by suggesting that the account given is substantially an untrue representation of the contents of the house at the time of the fire. I do not think it was the intention of the legislature that such questions should be referred to arbitration under this section.

D

The judge ought, therefore, to have ruled that having regard to the chronology of events that there was no lack of diligence on the part of the contractor in invoking the arbitration clause and that the application for a stay under s 6 of the Act was made bona fide.

E

As to (d): Had the contractor taken any step in the action before applying for a stay?

It will be recalled that in the view of the judge, the filing of affidavits by the contractor seeking discharge of the ex parte interlocutory injunction and

F the taking of the preliminary objection before Anuar J challenging the jurisdiction of the court to grant the same was 'definitely a step in the proceedings' by the contractor.

In considering this part of the case, some degree of repetition will be inevitable.

The sub-contractor had issued his writ on 21 November 1991 and, on

G the same day, obtained the ex parte interlocutory injunction. Exactly one week later, the contractor entered conditional appearance to the writ and applied to have the proceedings stayed on the ground that the sub-contractor's claims should be arbitrated. It was only after applying for a stay that the contractor filed a number of affidavits opposing the grant of the

H injunction.

On 3 December 1991, the contractor raised a preliminary objection challenging the court's jurisdiction to grant the injunction, but this was overruled.

However, on 2 January 1992, the ex parte interim injunction was dissolved

I by consent of the parties.

In *Roussel-Uclaf v GD Searle & Co Ltd*,[8] one of the issues which arose for decision was whether resisting an application for interlocutory injunction by putting in evidence and appearing in court was a step.

In the course of his judgment, Graham J, having referred to *Zalinoff v Hammond*[9] and *Pitchers Ltd v Plaza (Queensbury) Ltd*[10] said this at p 231 col 2 para 1 to p 232 col 2 para 1: A

> On the whole, I think that the statute is contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction. Such a remedy against a defendant might well be necessary whether the action was ultimately stayed or not, in order to preserve, for example, the property the subject of the action in the meantime; and, as a practical matter, in such a case it would not be of importance whether the application to stay was made before, at the same time as or after the application for an injunction. Here it is not suggested that the plaintiffs were in any way embarrassed or taken by surprise by the making of the application to stay at the date at which it was made and I see no reason to penalize Searle (UK) in that respect. I do not think the present case is covered by the authority of *Pitcher*'s case and it seems to me that the reasoning of Stirling J in the *Zalinoff* case is more pertinent to the circumstances here where an application for an injunction was being resisted.
>
> I therefore, hold, in the circumstances of the present case, that Searle (UK) did not take any step in the action between the date of appearance and delivery of pleading such as to debar them from relief by way of stay. I therefore hold on this second ground also that a stay ought to be granted in respect of the action against both defendants.

B C D

Before us, perhaps understandably, counsel for the sub-contractor conceded — we think quite correctly — that this particular ground relied upon by the judge was untenable. E

In our view, regard being had to the circumstances outlined above, the judge ought to have held that the conduct of the contractor did not indicate an election to abandon its right to a stay nor did it have the effect of invoking the jurisdiction of the court and so the contractor had not taken a step in the proceedings. F

By way of postlude, there are certain general observations we should like to make.

It is well known that if a party can satisfy the court that the conditions for the grant of a stay under s 6 of the Act are satisfied, it does not ipso facto follow that he will be entitled, as of right, to a stay, for the court still retains a discretion to refuse it. But, generally, as the judge rightly recognized, the approach of the court will be that those who make a contract to arbitrate their disputes, should be held to their bargain for, in the oft-quoted words of Martin B in *Wickham v Harding*,[11] 'A bargain is a bargain, and the parties ought to abide by it, unless a clear reason applies for their not doing so.' G H

Accordingly, although we are satisfied that the contractor had satisfied all the requirements for a stay, we must go on to consider whether we should reverse the discretion of the judge.

Now, it is clear by the law as it was laid down in *Heyman v Darwins Ltd*,[12] that the onus is on a plaintiff to satisfy the court that it is proper to refuse the application for a stay. Indeed, the case of *The Eleftheria*[13] shows that strong grounds for refusing a stay must be exhibited by a plaintiff. I

During the argument, counsel for the contractor had pointed out that the primary issue in the present case was whether the termination of the

A sub-contract by the contractor was wrongful and this would involve extensive evidence being adduced on construction practice and custom.

On the other hand, counsel for the sub-contractor pointed out that the practical consequences of granting a stay should not be lost sight of. In particular, he referred to the fact that after the application for a stay had been refused, the sub-contractor had obtained summary judgment in O 14 proceedings, in respect of which the High Court had heard further argument, and reserved judgment. He argued that the contractor ought to have, but did not, apply to the Supreme Court for an interim stay of the judge's order refusing the application for stay under s 6 of the Act. Therefore, said counsel, if this appeal were allowed, resulting in a stay under s 6 of the Act, much judicial time will have been wasted.

In reply, counsel for the contractor stressed that the sub-contractor had commenced the O 14 proceedings as late as 17 January 1993, some 13 months after the contractor's application for stay under s 6 of the Act was filed and some nine months after the appeal from the registrar's decision refusing it was dismissed by the judge. Indeed, the record provided shows that the contractor's application for stay under s 6 of the Act was issued as long ago as 28 January 1991. Furthermore, said counsel, the O 14 proceedings related to only part of the sub-contractor's claims so that there would still be other claims under the writ to be considered.

We do not consider that the contention of counsel for the sub-contractor that were a stay under s 6 of the Act granted at this stage, much judicial time will have been wasted, should prevail, considering that it was the sub-contractor who pressed on with the O 14 proceedings, knowing full well that the present appeal by the contractor was pending.

On the other hand, having examined afresh the background to this dispute and the course which the proceedings have taken, not forgetting the cogent submissions of counsel on both sides, with a view to examining by way of review the discretionary aspects of the judge's order, we are satisfied that quite apart from the misdirection in law by the judge in his approach to the registrar's decision, to which we have referred, that the exercise of the discretion by the judge in refusing a stay, was not justified on the facts. We consider that in this case, an arbitrator with the necessary expertise might well be better able to deal with the issues which will arise for decision — and they would be mainly issues of fact — than a judge.

In the result, we allow the appeal with costs at all levels, set aside the orders of the registrar and the judge, and substitute, in lieu thereof, an order for stay of proceedings under s 6 of the Act, as prayed for by the contractor in its summons. Consequently, the order for summary judgment under O 14 entered in favour of the sub-contractor against the contractor hereinbefore mentioned, is set aside, as the claims relating thereto, like the rest of the claims, will also have to be referred to arbitration. The deposit paid by way of security for costs must be refunded.

Appeal allowed.

Reported by Prof Ahmad Ibrahim